Judicial Council of the Ninth Circuit

Standing Committee on Alternative Dispute Resolution Programs

Model Local ADR Rule

December 1, 1999

This model local rule was prepared by the Standing Committee on Alternative Dispute Resolution Programs of the Ninth Circuit. Courts are free to adopt such parts of the rule, if any, as they deem appropriate. Copies of the rule may be obtained from the address listed below.

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Local options are shown in *bold italics within [brackets]*.

Provisions of the Act are set out in the endnotes with quotations from the Act in italics.

PROCEDURES FOR ALTERNATIVE DISPUTE RESOLUTION
(Revised December 1, 1999)

INDEX TO PROCEDURES

RULES SPECIFIC TO PARTICULAR FORMS OF ADR

(a) INTRODUCTION.

(1) Purposes. Pursuant to the findings and directives of Congress in 28 U.S.C. § 651 *et seq*., this Local Rule provides parties to civil cases in this district with opportunities to use alternative dispute resolution (ADR) procedures. This Local Rule is intended to provide parties access to the dispute resolution process that best serves their needs and fits their circumstances, to reduce the financial and emotional burdens of litigation, and to enhance the court's ability to timely provide traditional litigation services.[1] Through this Local Rule, the court authorizes and regulates the use of court-sponsored ***[mediation] [early neutral evaluation] [consensual mini-trial] [arbitration under § 654, et seq.] [and/or] [other appropriate ADR process].***[2]

(2) Scope.

(A) Cases Pending Before a District Judge or Magistrate Judge. This Local Rule applies to all civil cases pending before any district judge or magistrate judge in this district ***[except that cases in the following categories are exempt from presumptive inclusion: _____, _____, _____, or _____].***[3] ***[The fact that a case falls in a category that is exempt from presumptive applicability of this Local Rule neither (1) precludes the parties to such a case from agreeing to participate in an ADR process, nor (2) deprives the court of authority to compel participation in an appropriate ADR proceeding.]***

(B) Proceedings Pending Before a Bankruptcy Judge. Parties to proceedings pending before any bankruptcy judge in this district also may be afforded an opportunity to participate in ADR, but because of the unique circumstances that attend proceedings in bankruptcy, the provision of ADR services in the bankruptcy court is governed separately by ***[Bankruptcy Local Rules ____].***[4]

(3) Rules Specific to Individual ADR Processes. While many of the provisions of this Local Rule apply to all ADR processes conducted under its auspices, there are differences among ADR processes that require some process-specific prescriptions. Rules that are applicable only to a particular process are set forth in sections (r-u) below.

(4) Parties Retain Right to Secure ADR Services Outside the Programs Sponsored by the Court. Nothing in this Local Rule precludes the parties from agreeing to seek ADR services outside the court's program. ADR proceedings

conducted outside this Local Rule, however, will not be subject to the enforcement, immunity, or other provisions of this Local Rule.[5]

(5) Parties May Request an ADR Process at any Time. Notwithstanding any other provision of this Local Rule, parties, individually or in any combination, retain the right to ask the assigned judge, at any stage in the proceedings, to refer the case, in whole or in part, to an appropriate ADR process. Any reference made in response to such a request must be consistent with the provisions of sections (c) (Selection of an Appropriate ADR Process) and (i) (Integration with Case Management). ***[The court will enter an order of reference only if all parties voluntarily agree to the proposed reference.]***

(b) PROGRAM ADMINISTRATION.

(1) ADR Judge.

(A) Appointment. A ***[district or magistrate]*** judge will be appointed to serve as ADR Judge of this Court. When necessary, the Chief District Judge shall appoint another judge to temporarily perform the duties of the ADR Judge.

(B) Duties. The ADR Judge shall serve as the primary liaison between the Court and the ADR staff, consulting with that staff on matters of policy, program design and evaluation, education, training, and administration. ***[The ADR Judge shall rule on all requests by parties to be excused from appearing in person at any ADR proceeding and shall hear and determine all complaints alleging violations of this Local Rule.]***[6]

(2) Director of the ADR Program/ADR Administrator. The ***[Director of the ADR Program or ADR Administrator]*** shall be responsible for implementing, administering, overseeing, and evaluating the ADR program and procedures covered by this Local Rule.[7] These responsibilities shall extend to educating litigants, lawyers, judges, and court staff about the ADR program and rules. In addition, the ***[director or administrator]*** shall assure that appropriate systems are maintained for recruiting, screening, and training neutrals, as well as for maintaining on an ongoing basis the neutrals' ability to provide role-appropriate and effective services to the parties.

(3) Rules and Materials Available. The Clerk of Court shall make pertinent rules and explanatory materials available to the parties.

(c) SELECTION OF AN ADR PROCEDURE.

(1) Early ADR Selection Process.

(A) The Parties' Duty to Consider ADR,[8] Confer, and Report. ***[Within ___ days following filing/service of the complaint] [___ days prior to the case management conference /Rule 16 scheduling conference] [No fewer than ___ calendar days before a scheduling order is due under Fed. R. Civ. P. 16(b)],*** unless otherwise ordered***,*** in every case to which this Local Rule applies, the parties[9] must meet and confer about:

(i) whether they might benefit from participating in some ADR process;

(ii) which type of ADR process, if any, is best suited to the specific circumstances in their case; and

(iii) when the ADR session, if any, should be held

The parties must report in their case management statement ***[or in a statement filed separately]*** their shared or separate views about the utility of ADR, which ADR procedure, if any, would be most appropriate, and when the ADR session should occur. In these reports or statements, counsel must certify expressly that they understand and have explained to their clients the local ADR rules and process options and that, with their assistance, their clients have carefully considered whether their case might benefit from participation in any of the available ADR programs. If any party recommends using ADR, this report or statement must be accompanied by a Proposed ADR Order of Reference in conformity with section (h), below.

[Option A]

(B) Designation of Process. After considering the parties' submissions, the court may order the parties, on appropriate terms and in conformity with section (i) (Integration of Case Management) below, to participate in ***[mediation or early neutral evaluation]***.[10] If all parties consent, the court may refer the case to arbitration under 28 U.S.C. § 654 *et seq.*, to a non-binding mini-trial, to an advisory summary jury or bench trial, or to an ADR procedure which, by stipulation of all parties, has been tailored to meet the specific needs of the case.

[Option B]

(B) Voluntary Selection of Process. If, after considering all pertinent circumstances, all parties voluntarily agree that referral to a particular ADR process is appropriate, the court may issue an order of ADR reference to the stipulated ADR process. The order will comply with section (i) (Integration of Case Management) below.

(2) Selection of ADR Process at Any Time After Issuance of Initial Case Management or Scheduling Order.

[Option A] Notwithstanding the provisions of subsection (c)(1) above**,** at any time before entry of final judgment the court may, on its own motion or at the request of any party, after affording the parties an opportunity to confer and to express their views, order the parties to participate in ***[mediation or early neutral evaluation]***[11] ***[and/or] [with the consent of all parties, refer the case to a mini-trial, an arbitration under 28 U.S.C. § 654, et seq., or an advisory summary jury or bench trial, or a specially tailored ADR proceeding].***

[Option B] At any time after issuance of the initial case management or scheduling order and before entry of final judgment, if all parties voluntarily agree that referral to a particular ADR process is appropriate, the court may issue an order of ADR reference to the stipulated ADR process. The order will comply with section (i) (Integration of Case Management) below.

(3) Protection Against Unfair Financial Burdens. Assigned judges will take appropriate steps to assure that no referral to ADR results in an imposition on any party of an unfair or unreasonable economic burden. A party who cannot afford to pay any fee normally charged under this Local Rule shall be excused from paying or shall be ordered to pay at an appropriately reduced rate.

(d) PANELS OF NEUTRALS; SELECTION OF NEUTRALS.

(1) Panels of Neutrals. For each type of ADR procedure authorized under this Local Rule, the court shall assure that a separate panel is maintained of persons who are trained and otherwise qualified to serve as neutrals for that ADR process. Only persons who agree to serve on the terms set forth in this Local Rule and in any pertinent General Orders, and whose background, training, and skills satisfy the requirements that the court establishes for the particular type of ADR procedure, shall

be admitted to and remain as members of the panel for that process.[12]

(2) Selection of the Neutral. The following procedures shall apply to selection of the neutral.

(A) Parties to Confer about Selection of Neutral and Confirm Neutral's Availability. Unless otherwise ordered, the parties must confer about and attempt to agree on a neutral at the same time they confer, under subparagraph (c)(1)(A), above, for the purposes of selecting an ADR process and suggesting the time frame in which the ADR session should be held. If authorized by the assigned judge, the parties may nominate a neutral who is not on the court-approved panel for the kind of ADR process that the parties propose to use.[13] Before nominating a neutral, the parties must have confirmed his or her availability and willingness to serve within the time frame they propose.

(B) Appointment of the Neutral When Parties Agree. If the parties agree on a neutral and confirm his or her availability, they must identify their nominee in the case management statement ***[or in a separate filing that meets these purposes]***. Absent substantial countervailing considerations, the assigned judge will appoint the neutral whom the parties have jointly nominated and who is willing to serve.

(C) Appointment of a Neutral When Parties Disagree. If the parties cannot agree on a neutral, they shall so state in their case management statement ***[or in a statement filed separately]***. Upon being so advised, the assigned judge will select an available neutral from the panel or order the ***[Director of the ADR Program] [the ADR Administrator] [the designated judicial officer]*** to select an available neutral from the appropriate panel.[14]

(D) Documents Provided *[by the Court] [by the Plaintiff]* to the Neutral. Promptly after the neutral is designated, ***[the Director of the ADR Program] [the ADR Administrator] [a designated judicial officer] [the Plaintiff]*** shall provide her or him with a copy of:

(i) the Order of ADR Reference (see sections (h) and (i), below);

(ii) each party's most recent pleading; and

(iii) any other order or document from the court file that sets forth requirements or stipulations related to the ADR

proceedings.

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As an alternative* to** the paragraphs that make up subsection **(d)(2)**, above, the following provision is suggested for courts that elect to have ***court staff assign neutrals to cases -- instead of trying to get the parties to select an agreed-upon neutral.

(2) Selection of Neutral by the Court *[Director of the ADR Program] [the ADR Administrator] [designated judge]*.

(A) Assignment of Neutral from Appropriate Panel. After the ADR process that will be used in a particular case has been approved or selected by the court, the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** shall assign a neutral from the appropriate panel who is available to serve during the period the session should be held and who has no disqualifying conflict of interest.

(B) Documents Provided by the Court to the Neutral. Promptly after the neutral is designated, the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer] [designated counsel]*** shall provide her or him with a copy of:

(i) the Order of ADR Reference;

(ii) each party's most recent pleading; and

(iii) any other order or document from the court file that sets forth requirements or stipulations related to the ADR proceedings.

(e) DISQUALIFICATION OF NEUTRALS.

(1) Applicable Standards. No person may serve as a neutral in an ADR proceeding under this Local Rule in violation of:

(A) the standards set forth in 28 U.S.C. § 455;

(B) any applicable standard of professional responsibility or rule of professional conduct; or

(C) any additional standards adopted by the court.[15]

(2) Mandatory Disqualification and Notice of Recusal. A prospective neutral who discovers a circumstance requiring disqualification shall immediately submit to the parties and to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** a written notice of recusal. The parties may not waive a basis for disqualification that is described in 28 U.S.C. § 455(b).

(3) Disclosure and Waiver of Non-Mandatory Grounds for Disqualification. If a prospective neutral discovers a circumstance that would not compel disqualification under rules of professional conduct or under 28 U.S.C. § 455(b), but that might be covered by 28 U.S.C. § 455(a) (impartiality might reasonably be questioned), the neutral must promptly disclose that circumstance in writing to all counsel and to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]***. A party may waive a possible basis for disqualification that is premised only on 28 U.S.C. § 455(a), but any such waiver must be in writing and delivered to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** within ten days of the party's receiving notice of the possible basis for disqualification.

An alternative to subsection (e)(3), above, regarding waiver of disqualification under § 455(a): A party who has not delivered a written objection to the ***[Director of the ADR Program] [or the ADR Administrator] [a designated judicial officer]*** within ten days of receiving written notice from a prospective neutral of a possible ground for disqualification based only on 28 U.S.C. § 455(a) shall be deemed to have waived any such objection.

(4) Objections Not Based on Disclosures by Neutral.

(A) One Peremptory Objection Permitted. Each party has the right to disqualify one proposed neutral by making a peremptory objection (*i.e.*, without stating a basis for the objection) to that person's appointment. The right to make a peremptory objection is waived unless exercised by delivering the objection in writing to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** within seven days of learning the identity of the proposed neutral.

(B) Objections for Cause. Within seven days of learning the identity of a proposed neutral, a party who objects for cause to service by that neutral must deliver to the ***[Director of the ADR Program] [the ADR***

Administrator] [a designated judicial officer] and to all other counsel a writing that specifies the basis for the objection. Any party who wishes to take exception to the objection must do so in a writing that is delivered to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** and to all other counsel within five days of receiving the objection. Promptly after the close of the period for submitting exceptions, the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** shall determine whether the proposed neutral will serve or whether another neutral should be selected.

(f) COMPENSATION OF NEUTRALS.

[Option A] Subject to subsection (c)(3) (Protection Against Unfair Financial Burdens), above, neutrals shall be compensated by the parties[16] at a rate specified by general order of this court[17] or otherwise by law, or at a different rate if all parties so agree.[18] In every case where the parties and neutral agree to a rate of compensation that differs from the rate set by the court, the neutral must disclose in writing to the ADR Administrator, before the ADR session is held, all the fee, expense, and reimbursement terms and limitations that will apply to the service by that neutral. ***[Any neutral may voluntarily serve on a pro bono basis].*** Actual transportation expenses reasonably incurred by neutrals ***[and/or arbitrators] [will] [will not]*** be reimbursed ***[by the court] [by the parties]***.[19]

[Option B] Neutrals shall serve without compensation. Actual transportation expenses reasonably incurred by neutrals ***[and/or arbitrators] [will] [will not]*** be reimbursed ***[by the court] [by the parties]***.

[Option C] Neutrals shall not be compensated ***[for preparation time before the ADR proceeding] and/or [for the first _____[20] hours of the ADR session]***. After ***[some specified number of]*** hours in session, the neutral may ***[continue to serve without compensation] or [give the parties the option of concluding the proceeding or paying the neutral for additional time]*** at ***[a mutually agreeable hourly rate]*** *or* ***[at an hourly rate fixed by General Order of this court]***. In every case where the parties and the neutral agree to a rate of compensation for time the neutral commits after the first _____ hours of session that differs from the rate set by the court, the neutral must disclose in writing to the ADR Administrator all the fee, expense, and reimbursement terms and limitations to which the parties and neutral have agreed. This written disclosure must be made no more than ten days after the agreement about compensation is reached. Actual transportation expenses reasonably incurred by neutrals ***[and/or arbitrators] [will] [will not]*** be reimbursed ***[by the court] [by the***

parties].

(g) IMMUNITY OF NEUTRALS. All persons serving as neutrals under this Local Rule are deemed to be performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.[21]

(h) PROPOSED ORDER OF ADR REFERENCE.

(1) File with Case Management Statement. If any party recommends using ADR, pursuant to section (c) of this Local Rule, Counsel must attach to their Case Management Statement ***(or to the statement they file separately to comply with this Local Rule)*** a Proposed Order of ADR Reference.

(2) Contents of Proposed Order. The Proposed Order of ADR Reference must:

(A) identify the type of ADR process that the parties have agreed is most appropriate for their circumstances;

(B) ***[identify by name and organizational affiliation the available neutral whom they nominate to serve in their case];***[22]

(C) if different from rates or terms fixed by the court, specify the proposed rate of compensation for the neutral, terms for reimbursement of the neutral's expenses, and any proposed limitations on compensation or expense reimbursement;

(D) specify the time frame within which they propose the ADR process will be completed and the date by which the neutral must file written confirmation of that completion; and

(E) suggest and explain any modifications or additions to the case management plan that would be advisable because of the reference to ADR.

(i) INTEGRATION WITH CASE MANAGEMENT

(1) Contents of Order of ADR Reference. Every order referring a case

to an ADR process under this Local Rule must specify:

(A) the ADR process to be used;

(B) ***[if known, the identity of the neutral who will serve in the case];***[23]

(C) if different from rates or terms fixed by generally applicable rule or order, specify the rate of compensation for the neutral, terms for reimbursement of the neutral's expenses, and any limitations on compensation or expense reimbursement;

(D) the dates by which the ADR proceedings must be completed and by which the neutral must file a confirmation of that completion;

(E) the date by which the parties must notify the court, in a jointly filed statement, whether all or part of the case has been resolved; and

(F) any pretrial activity, *e.g.,* specified discovery or motions, that shall be completed before the ADR session is held or that shall be stayed until the ADR session is concluded.

(2) Protection Against Unreasonable Delay. In fixing deadlines in its Order of ADR Reference, the referring court will assure that the time allotted for completing the ADR process is no more than is appropriate and that the referral does not cause unreasonable delay in case development, in hearing motions, or in commencing trial.

(3) Assigned Judge's Continuing Responsibility for Case Management. Neither the parties' agreement to participate in an ADR procedure nor the court's referral of an action to ADR shall reduce the assigned judge's power and responsibility to maintain overall management control of a case before, during, and after the pendency of an ADR process.

(j) TELEPHONE CONFERENCE WITH NEUTRAL BEFORE ADR SESSION. Promptly after being appointed to serve in a case, the neutral shall hold a brief joint telephone conference with all counsel to discuss:

(1) fixing a convenient date and place for the session;

(2) the procedures that will be followed during the session;

(3) who shall attend the session on behalf of each party;

(4) what material or exhibits should be provided to the neutral before the session or brought by the parties to the session;

(5) any issues or matters that it would be especially helpful to have the parties address in their written pre-session statements;

(6) page limitations for the pre-session statements; and

(7) any other matters that might enhance the utility of the ADR proceeding.

(k) WRITTEN PRE-SESSION STATEMENTS

(1) Deadline for Submission. No later than ten calendar days before the first ADR session, each party must serve on all other parties and deliver directly to the neutral a written ADR statement.

(2) Prohibition Against Filing. The parties' written ADR statements must not be filed and the assigned judge shall not have access to them.

(3) Content of Statement. Unless otherwise approved by the neutral during a telephone conference under section (j), above, each ADR statement must:

(A) not exceed the number of pages allowed by the neutral;

(B) identify by name and title or position:

(i) the person(s) with decision-making authority who, in addition to counsel, will attend the ADR session on behalf of the party; and

(ii) person(s) connected with a party opponent, if known, whose presence at the ADR session might substantially improve the productivity of the proceeding;

(C) describe briefly the substance of the litigation, addressing key liability and damages issues and discussing the most significant

evidence;

(D) identify any discovery or motion activity that is likely either to significantly affect the scope of the litigation or to enhance the parties' ability to assess the case's settlement value or, for other reasons, to improve prospects for settlement;

(E) describe the history and current status of any settlement negotiations;

(F) identify any other considerations, and set forth any additional information, that the party believes might enhance the utility of the ADR session; and

(G) if allowed by the neutral, attach copies of documents likely to be useful during the ADR session.

(l) FOR MEDIATIONS ONLY,[24] SEPARATE *EX PARTE* WRITTEN STATEMENTS

(1) Contents. Only if the ADR procedure being used is mediation, each party may submit directly to the mediator, for his or her eyes only, a separate, *ex parte* confidential written statement describing any additional interests, considerations, or matters that the party would like the mediator to understand before the mediation session begins.

(2) Timing. Any such additional *ex parte* written statement must be delivered to the mediator at the same time the party delivers the written statement required under section (k) of this Local Rule.

(m) ATTENDANCE AT THE ADR SESSION

(1) In Person Attendance. All parties and their lead counsel, having authority to settle and to adjust pre-existing settlement authority if necessary, are required to attend the ADR session in person unless excused under section (2), below. Insurer representatives also are required to attend in person, unless excused, if their agreement would be necessary to achieve a settlement.

(A) Corporations and Other Non-Governmental Entities. A

corporation or other non-governmental entity satisfies this attendance requirement if represented by a person (other than outside counsel) who has authority to settle, as defined above, and who is knowledgeable about the facts of the case.

(B) Governmental Entities. A unit or an agency of government satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, authority to settle, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements.

(2) Requests to be Relieved of Duty to Appear in Person.

(A) Duty to Confer. No one may ask the court ***[or the neutral]*** to be relieved of the duty to attend an ADR session in person, unless that person first has conferred about the matter with the other parties ***[and the neutral]*** who would be participating in the session.

(B) Standard. A person may be excused from attending an ADR session in person only on a showing that personal attendance would impose a serious and unjustifiable hardship.

(C) Timing and Content of Request; Proposed Order. No fewer than 15 days before the date set for the session, a party seeking to be relieved of the duty to attend in person must submit a letter to the ADR Judge ***[or the neutral]*** (copying all other parties) that sets forth all considerations that support the request, states realistically the amount in controversy in the case, and indicates whether the other parties ***[and the neutral]*** support or oppose the request. ***[Each such letter request must be accompanied by a proposed order.]***

(3) Participation by Telephone When Appearance in Person Is Excused. Every person who is excused from attending an ADR session in person must be available to participate by telephone, unless otherwise directed by the ***[ADR Judge] [assigned judge] [the neutral].***

(n) CONFIDENTIALITY OF ADR PROCEEDINGS

(1) Generally Applicable Provision. Except as provided in this Local Rule or by 28 U.S.C. § 657 (arbitrations),[25] and except as otherwise required by law[26]

or as stipulated in writing by all parties and the neutral, all communications made in connection with any ADR proceeding shall be confidential and may be privileged.[27]

(2) Limitations on Communication With Assigned Judge. No person may disclose to the assigned judge any communication made, position taken, or opinion formed by any party or neutral in connection with any ADR proceeding under this Local Rule except as otherwise:

(A) stipulated in writing by all parties and the neutral;

(B) provided in this Local Rule;

(C) provided in 28 U.S.C. § 657 (for arbitrations); or

(D) ordered by the court -- after application of pertinent legal tests that are appropriately sensitive to the interests underlying ADR confidentiality[28] – in connection with proceedings to determine:

(i) whether, if a record or a signed writing is produced that appears to constitute a binding agreement, the parties entered an enforceable settlement contract at the end of the ADR session, or

(ii) whether a person violated a legal norm, rule, court order, or ethical duty during or in connection with the ADR session.[29]

(3) Authorized Studies and Assessments of Program. Nothing in this Local Rule shall be construed to prevent any participant or neutral in an ADR proceeding from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate any aspect of the court's ADR program or to enforce any provision of this Local Rule. The identity of the sources of such information provided for purposes of monitoring or evaluating the ADR programs shall be appropriately protected.

(o) NEUTRAL'S REPORT THAT ADR PROCESS HAS BEEN COMPLETED.

(1) Timing and Limited Content. No more than five days after the ADR process has been completed, and by the deadline fixed in the Order of ADR

Reference, the neutral must file (copying all parties) a form that reports ***[only]*** the date on which the parties completed the ADR process.

(2) Prohibition on Disclosure of Confidential Communications or Neutral's Opinions. Absent a written stipulation signed by all parties, in making this report the neutral must not disclose to the assigned judge any confidential ADR communication or any opinions or thoughts the neutral might have about the merits of the litigation, about how it should be managed, or about the character of any party's participation in the ADR proceeding.

(p) PARTIES' JOINT REPORT AFTER THE ADR PROCEEDING. By the deadline fixed in the Order of ADR Reference, or, if no such deadline was fixed, no later than ten days after the ADR session has been concluded, the parties must jointly file a statement in which they report to the assigned judge:

(1) whether they have settled all or part of the case; and

(2) any proposals in which all parties join for case development, further exploration of settlement, motion practice, discovery, or trial.

(q) VIOLATIONS OF THIS LOCAL RULE

(1) Complaints Alleging Material Violations. A complaint alleging that any person[30] or party has materially violated this Local Rule must be presented in writing, under seal, directly to ***[the ADR Judge] [a judge who has been designated by the Chief Judge to hear the matter and to whom the underlying case is not assigned (the "designated judge")]***.[31] Copies of any such complaint must be sent to all counsel and the neutral at the time they are presented under seal to the ***[ADR Judge] [designated judge]***. Any such complaint must be accompanied by a competent declaration, must not be filed, and must not be presented to the judge to whom the underlying case is assigned for litigation.

(2) Proceedings in Response to Complaint. Upon receipt of an appropriately presented and supported complaint of material violation, the ***[ADR Judge] [designated judge]*** shall determine whether the matter warrants further proceedings. If further proceedings are warranted, the ***[ADR Judge] [designated judge]*** shall issue an order to show cause why sanctions should not be imposed. Any such proceedings shall be conducted on the record but under seal. The ***[ADR Judge]***

[designated judge] shall afford all interested persons an opportunity to be heard before deciding whether to impose or recommend a sanction.

RULES SPECIFIC TO PARTICULAR FORMS OF ADR

(r) MEDIATION.

(1) Definition.[32]

[Option A] Mediation is a process whereby an impartial third party (the *mediator)* facilitates communication between negotiating parties attempting to reach an agreed settlement of their dispute. In some mediations, the neutral may spend some time meeting separately and privately with one party or side at a time. When appropriate the mediator may also offer an evaluation of the case and/or recommend a settlement. Whether a settlement results from a mediation is within the sole control of the parties.

[Option B] Mediation is a process in which an impartial third party (the mediator) facilitates communication between parties and assists them in their negotiations (*e.g.,* by clarifying underlying interests) as they attempt to reach an agreed settlement of their dispute. In some mediations, the neutral may spend some time meeting separately and privately with one party or side at a time. Whether a settlement results from mediation and the nature and extent of the settlement are within the sole control of the parties.

(2) Criteria for Inclusion on the Panel of Mediators. In order to qualify for appointment to the court's Panel of Mediators, the applicant shall certify that he or she:[33]

(A)

(B)

(C)

****

(s) EARLY NEUTRAL EVALUATION.

(1) Definition. Early neutral evaluation (ENE) is a procedure in which the parties and their counsel, in a confidential session, present summaries of their cases to an experienced and impartial lawyer, judge, or retired judge, who evaluates the parties' legal positions and provides the parties and their counsel with a non-binding evaluation of the case. The evaluator may also help the parties identify areas of agreement, provide case-planning guidance, and, if requested by all parties, assist in negotiating a settlement of the dispute.

(2) Criteria for Inclusion on the Panel of Evaluators. In order to qualify for appointment to the court's Panel of Evaluators, the applicant shall certify that he or she:

(A)

(B)

(C)

****

(t) CONSENSUAL MINI-TRIAL.

(1) Definition. A mini-trial is a process containing both conciliatory and non-binding adjudicative elements. A mini-trial is consensual, non-binding, and non-judicial, as in negotiation or mediation, yet one of its primary features is an adversarial presentation of each party's case, as in arbitration or litigation.

In a mini-trial, each party's best case is presented in summary form to the parties themselves or to party representatives with authority to settle the dispute. Following the presentations, the parties enter into negotiations, typically with a neutral acting as a facilitator. The facilitator may act as an evaluator of the case if the parties so designate.

(2) Criteria for Membership of the Panel of Mini-trial Facilitators. In order to qualify for appointment to the court's panel of mini-trial facilitators, the applicant shall certify that he or she:

(A)

(B)

(C)

****

(u) ARBITRATION.

(1) Definition. Arbitration is a process whereby an impartial third party (the *arbitrator*) hears and considers the evidence and testimony of the disputants and others with relevant knowledge and issues a decision on the merits of the dispute. The arbitrator makes an *award* on the issue(s) presented for decision. The arbitrator's award is binding or non-binding as the parties may agree in writing.

(2) Criteria for Inclusion on the Panel of Arbitrators. In order to qualify for appointment to the court's panel of arbitrators, the applicant shall certify that he or she:[34]

(A)

(B)

(C)

(3) Standards for Certification of Arbitrators. All arbitrators shall be certified to perform services in accordance with the following standards:[35]

(A) The arbitrator shall take the oath or affirmation described in 28 U.S.C. § 453; and

(B) The arbitrator shall be subject to the disqualification rules under 28 U.S.C. § 455.

(4) Eligibility of Cases for Referral to Arbitration. No civil action shall be referred to arbitration except upon written consent of all parties. Notwithstanding the parties' request or consent to refer a case to arbitration, the court

shall decline to make such referral if it finds that:[36]

(A) the action is based on an alleged violation of a right secured by the Constitution of the United States;

(B) jurisdiction is based in whole or in part on 28 U.S.C. § 1343;

(C) the relief sought includes money damages in an amount greater than $150,000;[37] or

(D) the objectives of arbitration would not be realized for any other reason.

(5) Procedure for Consenting to Arbitration. Any request for reference to arbitration shall be in writing, signed by all parties and their counsel, and directed to the judge to whom the case is assigned. All such requests shall:

(A) State whether the parties desire that the entire case be referred to arbitration. If the parties desire that only certain issues or portions of the case be referred to arbitration, the parties shall identify with particularity those issues or portions of the case and state the reason(s) why such a request should be granted;

(B) State whether the arbitrator's award will be binding, with trial *de novo* waived, or non-binding, with trial *de novo* permitted if a request therefor is timely served and filed;

(C) Propose a discovery plan, a timetable for completion of the proposed discovery, and the date by which the arbitration shall be completed;

(D) Acknowledge that the arbitration shall be governed by the provisions of Title 28 U.S.C. chapter 44, as the same may be amended from time to time, and, to the extent applicable, 9 U.S.C. § 1 *et seq*.;

(E) Contain a certification that the parties have been provided access to materials describing the arbitration program, and that they agree to arbitration freely and knowingly;[38] and

(F) Provide such other information as may assist the court in determining whether to grant the request.

(6) Conduct of the Hearing; Protection Against Prejudice for Declining to Go to Arbitration.

(A) Unless otherwise ordered, all arbitrations under this Local Rule will be held before a single arbitrator who shall have the power to:[39]

(i) conduct the arbitration hearings;

(ii) administer oaths and affirmations; and

(iii) make awards based upon the facts and the law.

(B) The provisions of 28 U.S.C. chapter 44, as the same may be amended from time to time, shall govern all aspects of the arbitration proceeding authorized.

(C) ***[Option one: The arbitrator will apply the Federal Rules of Evidence with respect to all evidence offered by any party.] [Option Two: In receiving evidence, the arbitrator shall be guided by the Federal Rules of Evidence, but shall not thereby be precluded from receiving evidence which the arbitrator considers relevant and trustworthy and which is not privileged.]***

(D) The arbitrator shall apply Federal Rule of Civil Procedure 45 with respect to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this Local Rule.[40]

(E) No party or attorney may be prejudiced in any way for refusing to participate in arbitration.[41]

(7) The arbitrator shall make his or her award in writing and shall file the award under seal with the Clerk of Court promptly after the arbitration hearing is closed together with proof of service on all other parties by United States mail, addressed to the parties or, if represented, to the parties' attorney(s) of record. Unless the parties have waived trial *de novo,* the clerk shall seal the award, and the award shall remain sealed and the contents thereof not made known to any judge who might be assigned the case until the time has expired for a party to seek a trial *de novo* with no party timely serving and filing such a demand; *provided, however,* that the award may be unsealed after final judgment has been entered in the case or the action has otherwise been terminated.[42]

(8) If, in any non-binding arbitration conducted under this section, a resolution of all aspects of the dispute does not result and the case proceeds to trial, no reference to the arbitration proceeding, or the result thereof, may be made to the trier of fact; *provided however,* that nothing in this Local Rule shall prevent a party from presenting or using at the trial evidence presented in the arbitration proceeding, if such evidence is otherwise admissible under the Federal Rules of Evidence or the parties have stipulated to its use.[43]

(9) If trial *de novo* has not been waived by all parties, any party may demand a trial *de novo* of the issues referred to arbitration by serving and filing a request therefor within thirty (30) calendar days after service of the award. If a demand for trial *de novo* is timely served and filed, the case will be treated for all purposes, and the trial shall be conducted, as if no arbitration had occurred.[44]

(10) Nothing in this Local Rule limits any party's right to agree to arbitrate any dispute, regardless of the amount involved, pursuant to title 9, United States Code, or any other provision of law.[45]

COMMITTEE COMMENTARY

1. The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658, requires each federal district court to *authorize by local rule the use* of [at least one] ADR process in all civil actions, including adversary proceedings in bankruptcy, *except that the use of arbitration may be authorized only as provided in Section 654* of the Act. Congress found that there is a *continued growth of federal appellate court-annexed mediation programs which suggests that this form of alternative dispute resolution can be very effective; therefore, the district courts should consider including mediation in their local alternative dispute resolution program.* Section 651(c) states that *those courts with existing ADR programs shall examine the effectiveness* of their programs and *adopt such improvements* as are consistent with the Act.

2. Section 652(a) requires each district court *to provide litigants with at least one ADR process.* Section 651(a) includes *early neutral evaluation, mediation, mini-trial, and arbitration under § 654* in a non-exhaustive list of ADR processes that district courts may consider adopting. This listing does not restrict the district from offering other alternatives such as advisory mini-trials, advisory summary jury trials, or advisory summary bench trials.

There are two significant questions about the meaning of these fundamental components of the statute to which the Committee has given focused consideration. The first question is about "outsourcing" -- to what extent does the Act permit district courts to "outsource" part or all of their ADR programs? The Committee believes that the Act reflects a decision by Congress that each district court should be actively involved in the design, implementation, and oversight of its own ADR program -- and, therefore, that a district court would not be in compliance if it delegated responsibility for all aspects of its ADR program to some entity or group outside the court. We note, for example, that in § 651(d), the Act requires each court to "designate an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's [ADR] program." This provision, and others, indicate that Congress wants each court to be responsible in fact for the program it sponsors and sanctions -- to assure, among other things, that the program is of high quality and that service by neutrals conforms to apapropriate ethical norms.

It does not follow, however, that there are no sub-parts of its program that a district court could appropriately "outsource." A court might well determine, for example, that to provide its neutrals with the best possible training it is necessary to engage the training services of an outside entity. Similarly, a court might decide appropriately that to assure that the statutorily mandated "evaluation" of its program is as objective and reliable as possible it is necessary to engage professionals outside the court to conduct an independent assessment. Thus, the Committee believes that the Act would permit individual courts to "outsource" the front line work that is required to fulfill some of the duties the statute imposes. But each court retains, under the statute, ultimate responsibility for assuring that the quality and content of any delegated work satisfy the objectives contemplated in the Act. So before "outsourcing" any task, each court must take steps to assure itself that the work by the outside entity or professionals will conform to appropriate standands and will achieve the mandated ends.

The second broad question to which the Committee gave special attention relates to the role Congress expected magistrate judges to play in the ADR programs adopted under the Act. The Committee believes that a court clearly would not comply with the Act if its "ADR program" consisted of nothing more than making magistrate judges available to host settlement conferences. Magistrate judges have been doing extensive settlement conference work in many courts for many years -- a fact well-known by Congress before it enacted this legislation. No statute was necessary to sanction or promote such work -- and the Act never mentions settlement conferences. An ADR program that was limited to referring cases to magistrate judges for settlement conferences clearly would not "encourage and promote the use of alternative dispute resolution in [the] district" -- which, according to Congress' express declaration in the statute, is to be the primary purpose of each district court's ADR program. Moreover, because the Act requires each court to make at least one ADR process available to every civil case (except in limited categories of cases exempted by local rule), a district court whose ADR "program" consisted only of judicial settlement conferences would clearly be out of compliance unless it made such conferences available in all non-exempt cases. But the district courts do not have sufficient magistrate judge hours available to staff any such program -- and the Committee believes that one of the purposes of the Act was to free-up judge time for other work by encouraging the development of ADR programs in which persons other than judges would serve as the neutrals.

None of this means that magistrate judges have no role to play under the Act. While Congress called

expressly for the creation of "panels" of "neutrals," Congress also made it clear that such panels might well include magistrate judges -- as long as they "have been trained to serve as neutrals in alternative dispute resolution processes." Thus, a court could include magistrate judges in its panel of mediators or early neutral evaluators -- as long as the court first ensured that the particular judges involved had received specialized training in the particular role contemplated.

As the Model Rule makes clear, the Committee believes that magistrate judges could play another, very significant role in complying with the Act. A magistrate judge might well be a particularly appropriate "judicial officer" to be designated to "implement, administer, oversee and evaluate the court's alternative dispute resolution program." It might be easier to "earmark" a portion of a magistrate judge's time for this work than a portion of a district judge's time -- and assigning these kinds of larger-scale responsibilities to a judicial officer instead of a clerk's office employee might well enhance the standing of the program in the community and within the court itself and improve its vitality and quality. Assigning responsibility to enforce the ADR rules to a magistrate judge also offers significant advantages -- in saving the time of the district judges and in insulating them from the possibility of exposure to sensitive settlement-related communications.

3. Each district court may identify here those categories of civil cases, if any, that the court has concluded, after consulting with the local bar and the United States Attorney, should not automatically be subject to this Local Rule.

Section 652(b) permits courts to identify *cases or categories of cases* in which ADR would not be appropriate and to *exempt* from these requirements those categories of cases. Section 652(b) further directs that before deciding which types of cases should be exempt, *each district court shall consult with members of the bar and with the local United States Attorney.*

4. The relationship between the ADR Act and matters that remain in bankruptcy courts is unclear. There seems to be a consensus that Congress intended the Act to apply to adversary proceedings in bankruptcy matters where the reference to the bankruptcy court has been withdrawn -- so the adversary proceeding is being handled directly by the district court. It is not clear whether Congress intended the Act to apply to matters that proceed within the bankruptcy courts.

The Model Rule encourages bankruptcy courts to provide ADR opportunities to participants in bankruptcy proceedings -- but the Model Rule does not regulate or govern ADR programs that bankruptcy courts establish. Rather, the Model Rule recognizes that ADR programs in bankruptcy courts should be regulated by separately crafted sets of rules, rules tailored to fit the special circumstances that obtain in the bankruptcy setting.

5. ADR proceedings are not deemed to be "conducted outside this Local Rule" when the district court orders the parties to participate in ADR under this Local Rule (without their freely-given consent) but permits the parties to select a neutral who is not on the roster of neutrals that the court has approved. Nor is an ADR proceeding deemed to be "conducted outside this Local Rule" when all parties voluntarily consent to participate under this Local Rule and the assigned judge enters an order of reference approving service by a specifically identified neutral whom all parties want to serve but who is not on the roster of neutrals the court has approved.

However, the Ninth Circuit's ADR Committee does not recommend approval by district judges of service by neutrals not on the roster the court has approved because this practice can jeopardize quality control and give rise to immunity issues.

Courts that permit parties to use a neutral who is not on the roster the court has approved should give active consideration to requiring each non-roster neutral, as a condition to serving, to (1) certify that he or she meets the qualifications the court has set for neutrals to be included on its roster, (2) take the oath in 28 U.S.C. § 453, and (3) expressly agree, in a writing that is filed before the neutral begins his or her service, to be bound by the provisions of the Court's Local ADR Rule, including particularly (but not exclusively) the provisions related to compensation and disqualification.

6. A district court may delete or modify the last sentence if the district determines that requests to be excused should be decided by the neutral or by the assigned judge, or that complaints alleging violations should be heard and determined by the assigned judge.

Choices among these options, as with many other decisions under the ADR statute, will vary with local practice and culture.

Some commentators believe that it is unwise to have the assigned judge hear and determine complaints about alleged violations of the ADR rules, in part because resolving such matters could require disclosure to the judge of sensitive settlement communications. And apprehension that such matters might be disclosed to a judge with power over their case might make some parties less forthcoming during the ADR proceedings.

7. Section 651(d) requires the district to *designate an employee or a judicial officer who is knowledgeable in ADR to implement, administer, oversee, and evaluate* the local program. The same section of the statute authorizes the designee to be responsible for recruiting, screening, and training neutrals. The ADR judge may also serve as the program administrator.

8. Section 652(a) directs each district court *to require all litigants (*except in certain cases exempted by the district) *to consider the use of ADR.*

The process of "considering" whether or not ADR might be helpful has two components -- first, "within" a side (or party) and second, across party lines.

Focusing first on the duty to consider ADR within a party or side, the Committee emphasizes that each lawyer has a duty to teach and advise her or his client thoroughly about the relative value of each ADR option in the specific setting of the case at bar. Toward this end, district courts might add a requirement that both counsel and client certify (*e.g.*, in the case management statement) that they have read specified court materials explaining ADR processes and have discussed the possible value of each of the available dispute resolution options.

One district court, for example, includes the following section in the standard form "Joint Case Management Statement and Proposed Order" that all parties must submit before the first Rule 16 conference:

> SIGNATURE AND CERTIFICATION BY PARTIES AND LEAD TRIAL COUNSEL
>
> Pursuant to Civil L.R. 16-6, each of the undersigned certifies that he or she has read the brochure entitled "Dispute Resolution Procedures in the Northern District of California," discussed the available dispute resolution options provided by the court and private entities, and has considered whether this case might benefit from any of the available dispute resolution options.
>
> Dated:_____ _____
>
> [Typed name and signature of each party and lead trial counsel]

The second component of "considering" ADR involves communication across party lines. Generally, it is preferable to involve the parties themselves in this communication, but in some instances it may be appropriate for counsel to conduct the meet and confer without direct client participation. See endnote 9 to this Local Rule.

9. In this context, the word "parties" does not necessarily mean the litigants themselves. While the Committee believes that the litigants should play a major and active role in the processes through which participation in ADR is considered, the Committee also recognizes that in some instances that participation need not include direct involvement in the "meet and confer" session that the Model Rule requires. When counsel have discussed the pertinent considerations and process options thoroughly with their clients in advance, there may be no need to have the clients also directly involved in the "meet and confer. The wisdom of direct client involvement in the meet and confer also may depend on the level of client familiarity with ADR, as well as the client's general sophistication about litigation in federal court. Courts and counsel must be careful, however, not to assume too much in these arenas -- a surprising percentage of clients who are quite knowledgeable about litigation (e.g., repeat institutional players) think they know more about ADR than they really do.

10. Section 652(a) provides that *any district court that elects to* ***require*** *the use of alternative dispute resolution in certain cases may do so only with respect to mediation [or] early neutral evaluation.* (Emphasis added.)

Within the Ninth Circuit, the only district court that is statutorily authorized to require parties (to certain kinds of cases) to participate in arbitration under Section 654(d) of the ADR Act of 1998 is the Northern District of California.

11. Id.

12. Section 653(a) requires each district to *adopt appropriate processes for making neutrals available for use by the parties for each category of process offered* and *to promulgate its own procedures and criteria for the selection of neutrals on its panels.* Section 653(b) directs courts to establish training and credential criteria for each neutral panel. These criteria could be set out in a general order or in the sections of this Local Rule devoted to the specific ADR processes. Examples of requirements that courts might impose for ADR neutrals are set forth in endnote 33.

13. See endnote 5 above, for comments about the use of neutrals who are not on the roster already approved by the court.

14. Courts should consider whether the designation of a neutral should ordinarily be done by someone other than the assigned judge. Some commentators have suggested that the following kinds of concerns can arise when the assigned judge selects the ADR neutral.

This practice might cause the parties to worry more that the neutral will disclose confidential ADR matters to the judge.

Being selected by the assigned judge might make the neutrals feel more pressure to "deliver" in the ADR process -- and thus might distort the role the neutral is supposed to play -- *e.g.,* might cause the neutral to put pressure on the parties to settle.

The assigned judge might not have thorough knowledge of the panel of neutrals, and so might not make the best informed selection, or might tend to appoint repeatedly the same small group -- leading to concerns about an elite club of lawyers who enjoy a special level of trust by the judge.

The fact that the judge has selected a particular neutral might be construed by other members of the bar as an expression of special confidence by the judge in that lawyer -- leading other lawyers to question the levelness of the playing field when they appear before that judge and their adversary is a lawyer the judge has selected for this important work.

Similarly, selection of the neutral by the judge might lead other members of the bar to worry that the judge feels indebted to the lawyer who served as the neutral (owes him or her a favor), especially if that lawyer-neutral was not compensated or helped settle some of the cases the judge otherwise would have been required to try.

15. In section 653(b) the Act requires each court to *issue rules . . . relating to the disqualification of neutrals.* The duty to issue such local rules attaches, under the statute, until national rules are promulgated on this subject -- but it is likely to be years before pertinent national rules are adopted. "Arbitrators" are the only neutrals that the Act expressly subjects to the disqualification rules set forth in 28 U.S.C. § 455.

16. "Arbitrators" serving in programs formerly authorized under Title IX of the Judicial Improvements and Access to Justice Act) are compensated with public funds, not by the parties.

17. Section 658(a) requires each court, subject to regulations approved by the Judicial Conference, to *establish the amount of compensation, if any, that each arbitrator or neutral shall receive for services rendered* in each ADR process. At its meeting in September of 1999, the Judicial Conference adopted one binding regulation and two non-

binding sets of guiding "principles" related to compensation of ADR neutrals in court-annexed programs. The regulation states:

> COMPENSATION OF ADR PROVIDERS:
>
> a. Approve for inclusion in the *Guide to Judiciary Policies and Procedures* the following regulation regarding the compensation of alternative dispute resolution neutrals (including arbitrators):
>
> All district courts must establish a local rule or policy regarding the compensation, if any, of neutrals for services rendered under Chapter 44 of Title 28, United States code, §§ 651-658. Discretion remains with the court as to whether that rule or policy should provide that neutrals serve *pro bono* or for a fee. As long as funding is not provided pursuant to the Act, the Judicial Conference does not encourage courts to institute rules or policies providing for court-funded, non-staff alternative dispute resolution neutrals.
>
> b. Adopt the two principles and accompanying commentary as set out [below].
>
> The recommended principles are as follows:
>
> (a) Where an ADR program provides for the neutral to receive compensation for services, the court should make explicit the rate of and limitations upon compensation.
>
> Commentary: Methods of compensation for ADR neutrals vary widely from court to court. Some courts use a panel of neutrals who serve completely *pro bono*. Other courts use a modified program, where a certain number of hours are provided free of charge, with a fixed hourly rate thereafter to be paid by the parties, while still others have a fixed per-case payment schedule. Other programs have left the matter of compensation to the participants themselves, for negotiation with the neutral. Whatever funding mechanism is decided upon, the court's rule should minimize undue burden and expense for parties electing to use ADR.
>
> (b) *When an ADR program provides for neutrals to receive compensation, the court should require both the neutrals and the parties to disclose all fee and expense requirements and limitations in the ADR process. A participant who is unable to afford the cost of ADR should be excused from paying.*
>
> Commentary: Where courts permit neutrals to charge a fee to ADR participants, fee disputes can be prevented through disclosure of the fee arrangements. If the court intends to require a certain level of *pro bono* service in order to participate as a neutral in a court-annexed ADR program, the level of the *pro bono* commitment should be explicitly defined.

See also note 33, ¶ 9, below.

18. As pointed out in the preceding note, at its meeting in September of 1999, the Judicial Conference of the United States approved a non-binding "principle" urging district courts whose programs provide for compensation of neutrals to "make explicit the rate of and limitations upon compensation."

In the spirit of this "principle," the Committee observes that several kinds of problems can ensue when courts leave the rate of compensation to be negotiated between the parties and the prospective neutral. First, the court risks losing control over the rate. In so doing, the court increases the risk that the ADR proceedings conducted in its name will impose unjustifiable economic burdens on the parties.

This risk is magnified by the second potential problem: a litigant who is "negotiating" with the person who will serve as the neutral might fear that the neutral will be angry or resentful if the litigant expresses any reluctance to pay whatever fee the neutral proposes, or if the litigant proposes a rate of compensation that could be construed as ungenerous or unflattering to the neutral. A litigant in that position has no real bargaining power -- and would justifiably be resentful of being put in this position by a court rule (a position in which the litigant could be taken advantage of unfairly).

Finally, many good mediators feel that "negotiating" a fee can put a strain on their relationship with the parties -- and either distort their role or make it more difficult for them to build the kind of trust from the parties that they need to serve effectively.

19. Section 658(b) directs that each district court *may reimburse arbitrators and other neutrals for actual transportation expenses . . . incurred*, under regulations prescribed by the Director of the AO.

20. For example, in the Northern District of California, the neutrals are expected to serve without compensation for the first four hours of the ADR session.

21. In the Act, Congress explicitly conferred "quasi-judicial function" immunity only on "arbitrators." See 28 U.S.C. § 655(c). There is, however, case law authority for the view that court-appointed mediators and early neutral evaluators are agents of the judicial process performing functions sufficiently similar to and integral with the judicial function to warrant entitlement to this immunity. See, e.g., Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994). A good many states also have conferred immunity on neutrals serving in ADR programs in state courts. *See, e.g., Col. Rev. Stat. Ann. § 13-22-507 (West 1998) [Immunity]; Fla. Stat. Ann § 44.107 (West 1998) [Immunity for Arbitrators & Mediators]*; *Ga. Code Ann. ADR VII(B) [Confidentiality and Immunity]; Me. Rev. Stat. Ann. Tit. 4, § 1506 (West 1997) [Immunity from Civil Liability]*.

Immunity is a privilege that should be conferred only when a court has met its responsibility to undertake reasonable steps to assure quality control over the neutrals who serve under the court's auspices. Such steps should include:

(a) imposing specific background, experience, training, and skill qualifications on all neutrals who serve in the court's program;

(b) establishing mechanisms to assure that neutrals maintain their skills and knowledge at an appropriate level;

(c) providing means by which parties and lawyers can give feedback to the court about how the neutrals performed -- and for addressing shortfalls in performance by additional training or by removing persons from the rosters of approved neutrals;

(d) requiring each neutral to take the oath of office in 28 U.S.C. § 453; and

(e) requiring each neutral to comply with all pertinent disqualification norms, including those set forth in 28 U.S.C. § 455.

22. This provision would not apply if the court, *e.g.,* through an ADR Administrator, designates the neutral without earlier input from the parties.

23. In some ADR programs, the assigned judge will not know the identity of the neutral who will serve when the judge issues the Order of ADR Reference -- *e.g.,* because a program administrator will designate the neutral later, after locating someone from the roster who is available during the contemplated time frame, who has the appropriate subject matter expertise, and who clears the disqualification rules.

24. The Model Rule provides for submission of separate statements only when the ADR process will be "mediation" because in no other ADR process is it appropriate for the parties to communicate with the neutral *ex parte* (except about scheduling) before the ADR session.

25. Sections 657(a), (b) and (c) of the Act govern the confidentiality of arbitration proceedings and awards. If a timely demand is made for trial *de novo*, the action will be *restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration,* and the arbitration award *shall not be made known to any judge who might be assigned to the case until the district court has entered final judgment . . . or the action has otherwise terminated.*

26. See, e.g., Rinaker v. Superior Court, 62 Cal.App.4th 155 (3d Dist. 1998).

27. Section 652(d) provides that until nationally applicable rules are promulgated under chapter 131 of Title 28, *each district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution process and prohibit disclosure of confidential dispute resolution communications.* National rules on this subject are not likely to be in effect for several years.

The Rules Enabling Act, 28 U.S.C. § 2074(b), provides that any rule that is promulgated through the rule-making process and that creates or modifies 'an evidentiary privilege shall have no force or effect unless approved by Act of Congress.' This provision, understood in connection with the history and substance of Federal Rule of Evidence 501, raises serious questions about whether a district court has authority to adopt a federal 'evidentiary privilege' through the local rule-making process.

By contrast, Rule 501 clearly acknowledges the legitimacy of the recognition of federal evidentiary privileges by federal courts through the common law. See Trammel v. United States, 445 U.S. 40, 47 (1980). At least two opinions by individual judges have held that there is a federal common law privilege that offers protections to mediation communications. See Folb v. Motion Picture Industry Pension & Health Plans, 16 F.Supp. 2d 1164 (C.D. CA 1998), and Sheldone v. Pennsylvania Turnpike Commission, 104 F.Supp.2d 511 (W.D. PA 2000). But see In re Grand Jury Subpoena Dated December 17, 1996, 146 F.3d 487 (5th Cir. 1998) (assumed there was no federal common law mediation privilege), and FDIC v. White, 1999 WL 1201793 (N.D. TX 1999) (trial court within Fifth Circuit also assumed there was no federal common law mediation privilege).

28. See, e.g., Olam v. Congress Mortgage, __ F.Supp. __ (N.D. Cal., October , 1999).

29. To reduce the risks that can attend disclosure of otherwise confidential ADR communications to the assigned judge, it generally would be preferable to have a judge to whom the underlying case is not assigned conduct proceedings to determine whether a party has violated a rule or committed some other wrong during an ADR session. Parties who fear that their settlement communications will be disclosed to the assigned judge are likely to participate less fully in the ADR process. And if the case is still being litigated after the ADR session, there is a risk that the assigned judge would be exposed to matters that might raise concerns about his or her impartiality if he or she heard and determined motions alleging violations of rules or other norms during the ADR session. If counsel know that such motions will be heard by the assigned judge, there also is a risk that such motions will be filed for tactical reasons.

30. The word "person" in this section includes any lawyer or other representative of a party as well as any person serving as a neutral in a court-sanctioned proceeding.

31. For reasons described in endnote 29, above, it is generally preferable for a judge other than the judge to whom the underlying case is assigned to hear and determine motions alleging violations of the rules or other wrongs during or in connection with the ADR session.

32. In some states, statutes define "mediation" and/or "mediators."

33. Section 653(a) requires each district court to *promulgate its own procedures and criteria for the selection of neutrals on its panels.* Section 653(b) requires *each person serving as a neutral in an alternative dispute resolution process [to] be qualified and trained to serve as a neutral in the appropriate alternative dispute resolution process.* Each district *may use, among others, magistrate judges who have been trained to serve as neutrals in alternative dispute resolution processes, professional neutrals from the private sector, and persons who have been trained to serve as neutrals in* ADR.

The following are examples of the kinds of requirements for inclusion in a panel of neutrals that some courts impose:

(1) Must have been a member of the bar *[or some other licensed professional organization]* in good standing for *[5], [7], [10], [15]* years; and/or

(2) Must have successfully completed a court-approved *[or court-conducted]* training course *[or a specified number of hours of court-approved or conducted training]* in *[the specific ADR process in which the neutral would serve, e.g., in mediation, in ENE, in arbitration, etc.]* The training must have included:

(a) instruction about the purposes and philosophy of the court's ADR program, as well as instruction in the court rules that are relevant to the neutral's service (including especially rules related to confidentiality, integration with case management, restrictions on communication with the assigned judge, and limits on the neutrals' powers and responsibilities);
(b) instruction in the characteristics and purposes of the particular ADR process (including the features that distinguish it from other ADR processes), the procedures and methods that it appropriately includes;
(c) monitored role playing -- with feedback and evaluation of performance -- and assessment by faculty of the candidate's suitability for the particular neutral role (appropriate temperament, patience, demeanor, listening and communication skills, etc.); and
(d) instruction in pertinent ethical issues and norms, e.g., how to identify ethical issues that might arise during service and suggested ways to respond, as well as standards for conflicts of interest and disqualification.

(3) Must have conducted or observed/co-conducted at least *[5] [10] [20] [mediations], [arbitrations], [early neutral evaluations];*

(4) Must take the oath in 28 U.S.C. § 453;

(5) Must abide by the disqualification rules of 28 U.S.C. § 455;

(6) Must agree to participate *[annually] [semi-annually] [periodically]* in court-approved refresher training or advanced training;

(7) Must agree (A) to permit participants in the ADR sessions they host to give feedback to the court about how the process was conducted and (B) to respond appropriately to suggestions about how to enhance the value of the process;

(8) ***[For early neutral evaluators and for arbitrators:]***
Must have substantial practice experience in and knowledge of the subject matter that will predominate in the kinds of cases in which the neutral will serve;

(9) ***[For courts that elect to require some pro bono service by members of their panels of neutrals:]*** Must agree to serve on a pro bono basis in *[two] [four]* cases per year, or must agree to provide *[15] [20]* hours of pro bono service as a neutral per year.

For more detailed discussion of issues related to qualifying people to serve in court-connected ADR programs, and for descriptions of standards imposed in a variety of different courts, see, e.g., *Qualifying Dispute Resolution Practitioners: Guidelines for Court-Connected Programs* (published by the State Justice Institute and Society of Professionals in Dispute Resolution, Washington, D.C. ca. 1997); *National Standards for Court-Connected Mediation Programs* (published by the State Justice Institute, Washington, D.C. ca. 1993); and *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* (published by the Federal Judicial Center and the CPR Institute for Dispute Resolution in 1996). See also the standards for service by ADR neutrals that are being developed jointly by the CPR Institute for Dispute Resolution (NY) and the Georgetown University Law School.

34. The ADR Act of 1998 does not specify criteria to qualify to be on the panel of arbitrators. Instead, Section 653(a) authorizes each district court to *promulgate its own procedures and criteria for the selection of neutrals on its panels.* Section 653(b) requires *each person serving as a neutral . . . [to] be qualified and trained to serve as a neutral in the appropriate alternative dispute resolution process.*

35. Section 655(b) requires each district that authorizes arbitration under the Act to establish standards of certification for arbitrators and to certify those who serve in this capacity.

36. Section 654(a) specifically provides for the four exceptions listed.

37. See subsection (u)(10) of this Local Rule.

38. Section 654(b)(1) specifically directs the court to establish procedures ensuring that the parties' *consent to arbitration is freely and knowingly obtained . . . .*

39. Section 655(a) sets out the specific powers of the arbitrator as listed.

40. Section 656 specifically applies to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter.

41. Section 654(b)(2) specifically directs that the court shall establish procedures ensuring that the parties' shall not *be prejudiced in any way for refusing to participate in arbitration.* Section 654(d), however, permits courts that were previously authorized to establish presumptively mandatory arbitration programs to continue such programs.

42. Section 657(a) and (b) provides for filing and sealing an arbitration award.

43. Section 657(c)(3)(A)-(B) provides for the exclusion of the evidence of arbitration.

44. Section 657(c)(1)(2) provides for the trial *de novo* of arbitration awards.

45. Section 651(e) provides: *This chapter shall not affect title 9, United States Code.*